

HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

RADIO SYSTEMS CORPORATION and  
INNOTEK, INC.,

Plaintiffs,

v.

TOM LALOR, individually, and  
BUMPER BOY, INC.,

Defendant.

Cause No. 2:10-cv-00828

OPPOSITION TO MOTIONS IN LIMINE  
AND  
OPPOSITION TO MOTION TO SEAL

Defendants Tom Lalor and Bumper Boy, Inc. (collectively "Lalor"), by and through the undersigned counsel, hereby submit this Opposition to Plaintiffs Radio Systems Corporation and Innotech, Inc.'s (collectively "Radio Systems") Motions in Limine (Dkt 80) and to its Motion to File Documents Under Seal (Dkt 84).

**I. MR. LALOR'S EXPERT TESTIMONY IS ADMISSIBLE**

Expert testimony should not admitted if it is unreliable as against the weight of generally accepted scientific principles. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993); Fed. R. Evid. 702; *Uniloc U.S. Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011). This Court has wide discretion whether to allow expert testimony, and its discretion will not be disturbed absent a showing of "manifest error." See *SEB S.A. v. Montgomery Ward & Co.*, 594 F.3d 1360, 1373 (Fed. Cir. 2010).

1     **A. Mark Hennings Should Be Able To Testify**

2             Radio Systems relies, almost exclusively, on *Sundance, Inc. v. DeMonte Fabricating*  
 3     *Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008) for the proposition that Mr. Hennings is not a  
 4     qualified technical expert merely because he is not skilled in the animal collar industry.  
 5     Radio Systems both misstates and misapplies the law.

6             In *Sundance*, the Federal Circuit held that a district court abused its discretion by  
 7     admitting the testimony of an expert “[d]espite the absence of any suggestion of relevant  
 8     technical expertise.” *Sundance*, 550 F.3d at 1361-62. However, *Sundance* has been  
 9     acknowledged by the Federal Circuit to be an anomaly, and the instant case is vastly more  
 10    analogous to the case of *SEB S.A. v. Montgomery Ward & Co.*, 594 F.3d 1360 (Fed. Cir.  
 11    2010). In *Montgomery Ward*, the Federal Circuit acknowledged that *Sundance* was an  
 12    “unusual situation” and held that an expert in patent law had sufficient technical expertise to  
 13    render an opinion on infringement. More specifically, the Federal Circuit found that SEB’s  
 14    expert had a relevant engineering degree and had worked with the U.S.P.T.O for 31 years in  
 15    various capacities, including “chemical technologies.” *Montgomery Ward*, 594 F.3d at 1373.  
 16    In addition, the Federal Circuit found that despite SEB’s expert having not worked “designing  
 17    deep fryers,” he nevertheless was qualified as an expert because the claimed invention  
 18    involved the selection of polymer material with certain characteristics, and he was qualified to  
 19    testify about that technology.

20            Radio Systems argues that Mr. Hennings does not have expertise in “the physiological  
 21    effects of the animal training collar upon the animal wearing the collar.” Dkt 80, page 6.  
 22    Fortunately, the Lalor patents do include any claims to physiological effects of animal collars.  
 23    Rather, the asserted claims of the Lalor patents are directed to describing whether a “high  
 24    point surface” is above “at least one electrode base.” See claim 1 of ‘082 Patent and ‘014  
 25    Patent. The claims are all specifically directed to a housing of a certain construction in which  
 26    resides some electronic circuitry. Nowhere are any “physiological effects” ever even  
 27    mentioned.

1 Similar to the situation in *Montgomery Ward*, Mr. Hennings has both formal and  
2 vocational training in the area of electrical circuits and in mechanical design. See Hennings  
3 Decl., ¶¶ 2-5. Mr. Hennings is formally educated in the hard sciences with two Masters  
4 Degrees (Computer Science and Digital Design) in the relevant technology. *Id.* at ¶ 4.  
5 Moreover, Mr. Hennings has additional coursework in robotics that included the study of  
6 “matrix transform theory” for determining, for example, the effects of changes in relative  
7 positions of independent robot “arms.” *Id.*

8 In addition, Mr. Hennings worked for years designing and testing electronic systems  
9 and circuit boards including designing and testing the form, fit, and function of components  
10 engineered to military specifications. *Id.* at ¶ 2-3. That experience included ensuring  
11 conformance with military specifications for both electrical and mechanical tolerances. His  
12 work experience involved physical measurements of placements and orientations of  
13 components. *Id.*

14 Still further, Mr. Hennings has been a registered patent attorney or agent for ten years.  
15 As part of that employment, Mr. Hennings frequently drafts and analyzes patent claims and  
16 patent documents. Mr. Hennings has prepared formal claim construction arguments during  
17 patent litigation. Thus, Mr. Hennings’ experience is particularly extensive in perhaps the most  
18 difficult part of an infringement analysis, understanding how to apply properly-construed  
19 claim language against an accused device. *Id.* at ¶ 5.

20 Quite contrary to Radio Systems’ position, there is absolutely no requirement that Mr.  
21 Hennings be skilled in the “animal training collar industry.” Mr. Hennings is not a damages  
22 expert, nor is he an expert on validity. His expertise is in the area of applying properly  
23 construed claims to an electro-mechanical device, an area in which Mr. Hennings is eminently  
24 qualified. Thus, Mr. Hennings education, technical training, and legal training all combine to  
25 make him eminently qualified to opine on the infringement by the accused products on the  
26 Lalor patents. To put it simply, Mr. Hennings is, perhaps, overqualified to render an opinion  
27 on whether one point on a housing is above another point.

1 Radio Systems also makes too much of the fact that Mr. Hennings did not do an  
 2 exhaustive investigation into the prior art that it has cited against Mr. Lalor's patent before  
 3 rendering an infringement opinion. Infringement is a completely separate analysis from  
 4 validity. The question of whether the claims of Mr. Lalor's patent read on the accused  
 5 products is a very self-contained analysis. Mr. Hennings was not asked to render an opinion  
 6 on whether Mr. Lalor's patents are valid, nor is he expected to testify on that subject matter.  
 7 In fact, Mr. Lalor has moved in limine to restrict Mr. Hennings testimony to the matters upon  
 8 which he did render an opinion. Dkt 76. It is wholly inappropriate to criticize Mr. Hennings  
 9 over testimony which he did not give and about which he does not plan to testify.

10 For all the foregoing reasons, Mr. Hennings is qualified as a technical expert for the  
 11 purpose of rendering an opinion on whether the asserted claims of the Lalor patents reads on  
 12 the accused devices. For these reasons, Mr. Lalor opposes Radio Systems motion in limine.

13 **B. Scott Cragun Should Be Allowed To Testify.**

14 **1. Admissibility of Mr. Cragun's Opinion**

15 Radio Systems erroneously objects to the expert testimony of Mr. Scott Cragun on the  
 16 basis that it is not adequately grounded in relevant facts. Quite the contrary, Mr. Cragun's  
 17 opinion (filed under seal) quite clearly identifies specifically the facts upon which it is based.  
 18 Mr. Cragun identified about eight license agreements that Radio Systems itself entered into.  
 19 Cragun Opinion, pages 7-12. All of those licenses related to animal collars or animal  
 20 products. Mr. Cragun's opinion indicates that all those licenses are relevant to the analysis of  
 21 an adequate royalty rate that would be applied in the instant action. Cragun Opinion, page 7.

22 Mr. Cragun then proceeds to carefully analyze the instant case against the backdrop of  
 23 all those prior licenses. Cragun Opinion, pages 12-20. Mr. Cragun's opinion is meticulous in  
 24 detail, and is firmly grounded in very specific, very relevant facts. That Radio Systems  
 25 believes it has some cause to challenge certain of those facts does not render Mr. Cragun's  
 26 testimony inadmissible. It is for the jury, not the Court to evaluate the correctness of the facts  
 27 underlying Mr. Cragun's opinion. *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 856 (Fed.

1 Cir. 2010), cert. granted, 562 U.S. —, 131 S.Ct. 647, 178 L.Ed.2d 476 (2010) (“[I]t is not  
2 the district court's role under Daubert to evaluate the correctness of facts underlying an  
3 expert's testimony.”).

4 The cases upon which Radio Systems relies to challenge Mr. Cragun's opinion stand  
5 for the proposition that the so-called “25% Rule”, which has been disavowed by the Federal  
6 Circuit, cannot be used to support a damages opinion that is not otherwise tied to the specific  
7 facts of the case at hand. In the instant case, Mr. Cragun has not relied on the 25% Rule nor  
8 has he made any mention of it. Rather, he has relied on specific relevant facts, and he has  
9 carefully analyzed the instant situation in light of those facts. Mr. Cragun did not render an  
10 opinion by arbitrarily picking a large royalty rate unrelated to the issues in this case. Such is  
11 simply not the case, and Radio Systems' position is not supported by the facts.

12 “Less comparable” does not equate to “radically different.” The licenses that Mr.  
13 Cragun relied on were, largely, licenses that Radio Systems itself has already entered into.  
14 Those licenses all pertain to the animal collar industry, and are comparable to the Lalor  
15 patent. That they are not “identical to” the Lalor patent does not make them “radically  
16 different” as would be necessary to render Mr. Cragun's opinion unreliable. See, *Uniloc U.S.*  
17 *Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1316 (Fed. Cir. 2011)(Patentee cannot rely on  
18 licenses that are “radically different” from the patents in suit).

19 Apparently Radio Systems would like to extrapolate the common-sense notion that  
20 “relying on “radically different” licenses is improper” into “relying on a license that is  
21 different in any way is improper.” Such is simply not the rule, and the licenses that were  
22 considered by Mr. Cragun are not only very relevant, they are perhaps the most relevant  
23 licenses that could have possibly been considered by Mr. Cragun.

24 Radio Systems also makes the curious argument that Mr. Cragun's opinion is  
25 unreliable because it is not based on licenses actually granted to the patents-in-suit. Dkt. 80,  
26 page 12. Apparently Radio Systems would like this Court to adopt a rule that unless a patent  
27

1 has in fact been licensed, there cannot be a damages calculation for its infringement. Such a  
 2 position is untenable and Mr. Lalor urges the Court not to adopt it.

3 For at least the foregoing reasons, Mr. Cragun's expert opinion is well based in  
 4 relevant facts, and Mr. Lalor urges this Court to deny Radio Systems' Motion in Limine.

## 5 **2. Opposition To Radio Systems Motion to Seal**

6 In addition to its motions in limine, Radio Systems has asked this Court to seal the  
 7 expert opinion of Mr. Cragun on the grounds (generally stated) that it encompasses  
 8 confidential business information. Dkt 84. However, Radio Systems has also hand-picked a  
 9 number of excerpts from that very report to substantiate its motion in limine opposing Mr.  
 10 Cragun's testimony. Dkt 80, pages 10, 12, 13. Radio Systems cannot ask this Court to make  
 11 everything in Mr. Cragun's opinion secret *except* the few things that Radio Systems would  
 12 like to share. At trial, (assuming his testimony is admitted by the Court) obviously Mr.  
 13 Cragun's testimony will be public information. It would be highly irregular to attach any  
 14 confidentiality to the testimony of a witness, even if that witness is testifying about sensitive  
 15 matters. Accordingly, Mr. Lalor opposes Radio Systems motion to seal Mr. Cragun's expert  
 16 opinion.

## 17 **II. MR. LALOR DID IDENTIFY THE ROBINS AND NUNN TESTIMONY**

18 Radio Systems has lodged some manner of objection concerning the testimony of Mr.  
 19 Dennis Robins and Mr. Murry Nunn . It is unclear from the motion exactly what relief Radio  
 20 Systems is seeking as the motion simply makes the general statement that Mr. Lalor did not  
 21 specify the particular roles of Mr. Robins or Mr. Nunn in response to an interrogatory request.

22 Radio Systems has been on notice of the expected testimony of both Mr. Robins and  
 23 Mr. Nunn since initial disclosures were served just over a year ago. Attached as Exhibit B is  
 24 a copy of Mr. Lalor's initial disclosures that were served on September 15, 2010. In those  
 25 disclosures, both Mr. Robins and Mr. Nunn were identified as individuals "familiar with Mr.  
 26 Lalor's conception, design and development of the inventions claimed in the '014 and '082  
 27 Patents." Exhibit B, page 3. On his pretrial statement, Mr. Lalor indicated that those two

1 witnesses may testify on *exactly* the same subject matter that was identified in Mr. Lalor's  
2 initial disclosures—verbatim.

3 Radio Systems is in the awkward position of having to argue that the disclosure of  
4 those two witnesses in Mr. Lalor's pretrial statement was sufficient notice of their testimony  
5 to prompt this motion in limine, yet the exact same disclosure was somehow insufficient  
6 notice that Radio Systems should have investigated that testimony during discovery. Radio  
7 Systems failed to investigate the testimony of Messrs. Robins and Nunn for reasons known  
8 only to them, but it is disingenuous to complain now that they were without sufficient notice  
9 of that testimony. Accordingly, Mr. Lalor objects to Radio Systems motion in limine.

10 **III. RADIO SYSTEMS' REMAINING OBJECTIONS ARE PREMATURE**

11 Radio Systems' also seeks to preclude Mr. Lalor, Mr. Robins, and Kenneth Xiong  
12 from providing expert testimony pursuant to F.R.E. 702. Mr. Lalor does not challenge Radio  
13 Systems' position that neither Mr. Lalor, Mr. Robins, nor Mr. Xiong have provided expert  
14 opinions in this matter under Fed. R. Civ. P. 26(a)(2), nor were they identified as testifying  
15 experts for trial. Radio Systems appears to be seeking relief for a problem which does not  
16 appear to exist. In a vacuum, it appears impossible to determine exactly what testimony  
17 Radio Systems is seeking to exclude. The only reasonable way to address this motion is to  
18 wait until Mr. Lalor begins presenting witnesses, and if any of those witnesses begins  
19 providing testimony that would be governed by F.R.E. 702, Radio Systems should raise the  
20 objection then. For these reasons, Mr. Lalor objects to Radio Systems' motion in limine.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**IV. CONCLUSION**

Mr. Lalor hereby opposes Radio Systems' motions in limine for the several reasons presented above.

Dated: November 14, 2011

Respectfully submitted:

/s/ Philip P. Mann

Philip P. Mann, WSBA No: 28860

MANN LAW GROUP

John Whitaker, WSBA No. 28868

WHITAKER LAW GROUP

1218 Third Avenue, Suite 1809

Seattle, Washington 98101

Phone (206) 436-0900

Fax (866) 341-5140

[phil@mannlawgroup.com](mailto:phil@mannlawgroup.com)

[john@wlawgrp.com](mailto:john@wlawgrp.com)

Attorneys for Defendants,  
Tom Lalor and Bumper Boy, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that on the day indicated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing at least to the following:

R. Bradford Brittain Matthew Stark MERCHANT & GOULD P.C. 110 Tyson Boulevard, Suite 203 Alcoa, TN 37701 Telephone (865) 380.5989 Facsimile (865) 380.5999 MStark@merchantgould.com rbrittain@merchantgould.com	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> CM/ECF Notification <input type="checkbox"/> Email
Duncan C. Turner, WSBA # 20597 Allyssa J. Hale, WSBA # 38429 BADGLEY~MULLINS LAW GROUP 4750 Columbia Center 701 Fifth Avenue Seattle, Washington, 98104 Telephone: (206) 621-6566 Facsimile: (206) 621-9686 duncanturner@badgleynullins.com <a href="mailto:ahale@badgleynullins.com">ahale@badgleynullins.com</a>	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> CM/ECF Notification <input type="checkbox"/> Email

Attorneys for Plaintiffs Radio Systems Corporation and Innotek, Inc.

Executed on November 14, 2011. /s/ John Whitaker  
 John Whitaker  
 Whitaker Law Group